

IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE NINTH CIRCUIT.

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CHESTER H. KIEHL, AS RECEIVER  
OF THE SOUTH BEND WATER  
COMPANY,

Plaintiff in Error,

vs.

THE CITY OF SOUTH BEND,

Defendant in Error.

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TRANSCRIPT OF RECORD.

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In Error to the United States Circuit Court, District  
of Washington, Western Division.

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FILED  
MAY 16 1896







*In the Circuit Court of Appeals of the United States, for the  
Ninth Circuit.*

CHESTER H. KIEHL, as Receiver of The South Bend Water Company, Plaintiff in Error, vs. THE CITY OF SOUTH BEND, Defendant in Error.	}	No.
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### **Stipulation as to Printing Record.**

It is hereby stipulated by and between the parties, by their respective attorneys, that the following portions of the record may be omitted in the printing of the transcript thereof, viz:

1. The summons, p. 20 of the original certified record.
2. The second, third, fourth, fifth, sixth, seventh and eighth causes of action or counts in the complaint, pp. 4-11; and in lieu thereof it may be stated that said counts, after the first, are drawn in the same form as the first, and are for the rentals for the respective months of October, November and December, 1893, January, February, March and April, 1894, at the rate of one hundred and eighty dollars per month.
3. The eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action or counts in the complaint, pp. 13-18; and in lieu thereof it may be stated that all of said counts are in the same form as the tenth count and are for the rentals of the respective months of June, July,

August, September and October, 1894, at the rate of one hundred and eighty dollars per month.

4. The verification of the complaint, p. 19.

5. All of the paragraphs of the answer from the twelfth to the fortieth paragraphs, both inclusive, pp. 27-45; and in lieu thereof it may be stated that paragraphs twelve, thirteen, fourteen, fifteen, fifteen one-half and sixteen set up respectively the same six separate defenses to the second cause of action which paragraphs six, seven, eight, nine, ten and eleven respectively, set up to the first cause of action in the complaint, with appropriate changes of date; that paragraphs seventeen to twenty-two, both inclusive, set up the like six defenses in the same order, with appropriate changes, to the third cause of action; that paragraphs twenty-three to twenty-eight, both inclusive, set up the like six defenses in the same order, with appropriate changes, to the fourth cause of action; that paragraphs twenty-nine to thirty-four, both inclusive, set up the like six defenses in the same order, with appropriate changes, to the fifth cause of action; and that paragraphs thirty-five to forty, both inclusive, set up the like six defenses in the same order, with appropriate changes, to the sixth cause of action.

6. All of the paragraphs of the answer from the forty-sixth to the eighty-second paragraph, both inclusive, pp. 48-70; and in lieu thereof it may be stated that paragraphs forty-one to forty-five, both inclusive, having set up essentially in the same form and in the same order, the first five defenses pleaded to each of the first six causes of action; paragraphs forty-six to fifty, both inclusive, set up the like five defenses in the same order and essentially in the same

form, with appropriate changes, to the eighth cause of action, which paragraphs forty-one to forty-five, both inclusive, set up to the seventh cause of action; that paragraphs fifty-one to fifty-five, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the ninth cause of action; that paragraph fifty-six sets up by reference the same five defenses to the tenth cause of action as paragraphs fifty-one to fifty-five, both inclusive, set up to the ninth cause of action; that paragraphs fifty-seven to sixty-one, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the eleventh cause of action; that paragraphs sixty-two to sixty-six, both inclusive, set up the like five defenses in the same order and essentially in the same form with appropriate changes, to the twelfth cause of action, that paragraphs sixty-seven to seventy-one, both inclusive, set up the like five defenses in the same order and essentially the same form, with appropriate changes, to the thirteenth cause of action; that paragraphs seventy-two to seventy-seven, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the fourteenth cause of action; and that paragraphs seventy-eight to eighty-two, both inclusive, set up the like five defenses in the same order and essentially in the same form with appropriate changes, to the fifteenth cause of action.

7. The verification and attorney's certificate of the answer, p. 71.

8. The verification of the reply, p. 77.

9. Sections two, seven and thirteen of ordinance No. 100 in the bill of exceptions, pp. 102, 103, 104, 105, 106, and 110, and in lieu thereof it may be stated that section two merely imposed the rule of due diligence on the grantee of the franchise and prohibited unnecessary obstruction of traffic in the construction of its works, and required it to restore the streets, &c., to their former condition and indemnify the city against damages; that section seven required the grantee to furnish an adequate supply of water and fixed a tariff of charges for water to different classes of consumers or for different purposes; and that section thirteen merely repealed a certain previous ordinance granting a like franchise to other persons, and provided that this ordinance should take effect from its passage and publication.

10. All of ordinance No. 118 in the bill of exceptions, pp. 110-120, except section nine on pp. 116-117, section ten on pp. 117-118, and sections twelve, thirteen, fourteen and fifteen, pp. 119-120; and in lieu thereof it may be stated that sections one and two are essentially the same, with immaterial verbal changes, as the same sections of ordinance No. 100; that section three sets forth a list of locations of twenty-five hydrants instead of the fifty hydrants required by section three of ordinance No. 100; that section four is essentially the same as section four of ordinance No. 100, with the addition of further requirements as to height of stream at certain localities; that section five is the same as section five of ordinance No. 100, with the addition of the city's right to use hydrants for street sprinkling and sewer flushing; that section six is the same as section six of ordinance No. 100, except for the change



of two miles to three, and of twelve hydrants to eight; that section seven is the same as section seven in ordinance No. 100, with the exception of a few trifling changes of rates; that section eight is the same as section eight of ordinance No. 100; that section eleven is the same as section eleven of ordinance No. 100, except slight verbal changes. All verbal changes above referred to or contained in any of the passages omitted from printing under this stipulation are immaterial to the legal questions involved.

11. The order extending the time to file the bill of exceptions, p. 95.

12. The bond for writ of error and the judge's approval thereof, p. 141.

13. The writ of error, allowance and admission of service, p. . . .

14. The citation and admission of service, p. . . .

CHARLES E. SHEPARD,

Attorney for Plff. in Error.

JOHN T. WELSH,

Attorney for Deft. in Error.

Dated April 15, 1896.

[Endorsed]: No. 293. In U. S. Circuit Court of Appeals, 9th Circuit. Chester H. Kiehl, Receiver, vs. The City of South Bend. Original Stipulation. Charles E. Shepard, Attorney of Plaintiff in Error, Bailey Building, Seattle. Filed May 1, 1896. F. D. Monckton, Clerk.

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*In the Circuit Court of the United States, for the District of  
Washington, Western Division.*

July Term, 1895.

Be it remembered, that on the 1st day of November,

1894, there was duly filed in said Circuit Court of the United States, for the District of Washington, Western Division, a Complaint in words and figures as follows, to-wit:

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*In the Circuit Court of the United States, for the District of  
Washington, Western Division.*

CHESTER H. KIEHL, as Receiver of The South Bend Water Company, vs. THE CITY OF SOUTH BEND.	} } } } }	No.
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### **Complaint.**

The plaintiff complains of the defendant and alleges that:

1. At all times herein after mentioned The South Bend Water Company was, and it still is, a domestic corporation, duly created and organized under the laws of the State of Washington, located and having its principal place of business at the city of Seattle, in King county, in said district, and vested by law and by the terms of its articles of incorporation with the powers and privileges of constructing and operating water works at the city of South Bend, in Pacific county, in said district, and of supplying to said city and to the residents thereof water for fire and domestic purposes; and during said time, said corporation has been engaged, either by itself or through the plaintiff, as its receiver, in operating such works and supplying water for said purposes under its corporate powers and franchises; and said corporation

then was, and still is, a resident of said district, and a citizen of said State.

2. At all times hereinafter mentioned the defendant was, and it still is, a municipal corporation, duly created and organized under the laws of said State, and located in said Pacific county, in said district, and in said western division thereof, and vested with all the usual powers of cities under the laws of said State, and particularly with the power of contracting for the supply of water to said city for the purpose of protection against fire and for other public purposes, and it was and is a resident in said district and a citizen of said State.

3. On May 23, 1894, at the city of Tacoma, in said western division, in a certain suit in equity then and there pending by Horace Phillips, as complainant, against said, The South Bend Water Company, as defendant, and numbered 300 on the files of said court, and which suit was brought by said complainant for the foreclosure of certain mortgages of said, The South Bend Water Company, to him, and for the winding up of said company as an insolvent corporation, said Court, by its order, then and there entered, appointed this plaintiff as the receiver of all the property of said company, with the usual powers and rights of such receiver, and among others, with the right of continuing and conducting the business of said company, and of supplying water to said city and to all its customers; and in and by said order said Court further ordered that this plaintiff, as such receiver, upon his qualification, should be entitled to demand and receive from said company the possession of all its property and a due conveyance and transfer of all its prop-

erty, and that he should conduct and continue its said business and pay its expenses and collect sums due or to become due to it for water service, either past or future.

Thereupon, this plaintiff duly qualified as such receiver by executing and filing the bond, and making and filing the oath required of him by the terms of said order, and immediately thereafter received from said company the possession of all its property, and entered upon the possession thereof and has ever since continued in the possession thereof and in the conduct and management of its said business, in its name and behalf, and has received from it a due transfer of all its rights and assets.

4. On November 5th, 1894, at said city of Tacoma, said Court by its order then and there entered in said suit numbered 300, by said Horace Phillips against said, The South Bend Water Company, directed the plaintiff to bring an action in said court against the defendant herein to collect all sums due from said defendant to said company for the supply of water to it, as hereinafter set forth, either while said company was acting under its own control and management, or under the control and management of the plaintiff as its receiver. The sum in controversy between the parties, exclusive of interest and costs, exceeds the sum of two thousand dollars (\$2,000), and this action is brought in pursuance of a lawful mandate of said Court, to-wit: said last mentioned order, and involves the rights and duties of an officer of said court, and an inquiry as to his rights under the laws of the United States.

I.

And thereupon for his first cause of action, the plaintiff alleges that:

1. On April 3, 1893, at the city of South Bend, in said district, said, The South Bend Water Company, contracted with the defendant to erect and connect with its water works, twenty-four double nozzle fire hydrants at certain points in said city, and to supply the same with water from said water works, for fire protection and other public purposes; and in consideration thereof the defendant agreed to pay, during the term of fifteen years from said date, to said, The South Bend Water Company, or its assigns, rental for said hydrants at the rate of seven dollars and fifty cents (\$7.50) per month for each hydrant in good order during said month, which rental was to be paid monthly for the number of hydrants in good order during the preceding month.

2. Thereupon said, The South Bend Water Company, on or about July 1, 1893, duly erected twenty-four such hydrants as aforesaid, at the points agreed upon between the defendant and said company, and designated by the defendant, and connected the same with its said water works and kept all of the same in good order, and supplied water thereto during the month of September, 1893, and the defendant thereby became indebted to said company for the rental of said hydrants during said month in the sum of one hundred and eighty dollars (\$180), which fell due to it on October 1, 1893, and no part whereof has been paid, and by reason of the premises, said sum

with interest at eight per cent per year from October 1, 1893, is due from the defendant to the plaintiff.

[The second to the eighth counts, inclusive, are omitted under stipulation. All are drawn in the same form as the first count and are for the rentals for the respective months from October, 1893, to April, 1894, inclusive, at the same rate.]

### IX.

And thereupon for his ninth cause of action, the plaintiff alleges that:

1. On April 3, 1893, at the city of South Bend, in said district, said, The South Bend Water Company, contracted with the defendant to erect and connect with its water works, twenty-four double nozzle fire hydrants at certain points in said city, and to supply the same with water from said water works, for fire protection and other public purposes; and in consideration thereof the defendant agreed to pay, during the term of fifteen years from said date, to said, The South Bend Water Company, or its assigns, rental for said hydrants at the rate of seven dollars and fifty cents (\$7.50) per month for each hydrant in good order during each month, which rental was to be paid monthly for the number of hydrants in good order during the preceding month.

2. Thereupon said, The South Bend Water Company, on or about July 1, 1893, duly erected twenty-four such hydrants as aforesaid, at the points agreed upon between the defendant and said company, and designated by the defendant, and connected the same with its said water works and kept all of the same in good order, and supplied water thereto from May 1, 1894, to May 22, 1894,

both inclusive, and the defendant thereby became indebted to said company for the rental of said hydrants during said twenty-two days in the sum of one hundred and twenty-seven dollars and seventy cents (\$127.70), which fell due to it on June 1, 1894, and no part whereof has been paid, and by reason of the premises, said sum, with interest at eight per cent per year from June 1, 1894, is due from the defendant to the plaintiff.

X.

And thereupon for his tenth cause of action the plaintiff alleges that:

1. On April 3, 1893, at the city of South Bend, in said district, said, The South Bend Water Company, contracted with the defendant to erect and connect with its water works, twenty-four double nozzle fire hydrants at certain points in said city, and to supply the same with water from said water works, for fire protection and other public purposes; and in consideration thereof the defendant agreed to pay, during the term of fifteen years from said date, to said, The South Bend Water Company, or its assigns, rental for said hydrants at the rate of seven dollars and fifty cents (\$7.50) per month for each hydrant in good order during said month, which rental was to be paid monthly for the number of hydrants in good order during the preceding month.

2. Thereupon said, The South Bend Water Company, on or about July 1, 1893, duly erected twenty-four such hydrants as aforesaid, at the points agreed upon between the defendant and said company, and designated by the defendant, and connected the same with its said water

works, and on May 23, 1894, the plaintiff having been appointed such receiver, as aforesaid, and qualified and entered into possession of the property of said company, and succeeded to all its rights in the premises, as aforesaid, kept all of said hydrants in good order and supplied water thereto from May 23, 1894, to May 31, 1894, both inclusive, in the name and behalf of said company, and in its own behalf, as such receiver, and the defendant thereby became indebted to him for the rental of said hydrants during said nine days in the sum of fifty-two dollars and thirty cents (\$52.30), which fell due to him on June 1, 1894, and no part whereof has been paid, and by reason of the premises said sum with interest at eight per cent per year from June 1, 1894, is due from the defendant to the plaintiff.

[The eleventh to the fifteenth counts, inclusive, are omitted under stipulation. All are in the same form as the tenth count and are for the rentals for the respective months of June to October, 1894, at the same rate.]

Wherefore, the plaintiff demands judgment against the defendant in his favor, as such receiver for two thousand five hundred and twenty dollars (\$2520), with interest at eight per cent per year on the several installments thereof, of one hundred and eighty dollars (\$180) each, from the respective dates when said installments became due, as aforesaid, as his damages, and for his costs of the action.

LICHTENBERG, SHEPARD & LYON,

Plaintiff's Attorneys.

Filed Dec. 12, 1894. A. Reeves Ayres, Clerk.

Service of the within summons and complaint accept-



ed, and copy thereof received this 4th (Fourth) day of December A. D. 1894.

MARION D. EGBERT,  
Mayor of City of South Bend, Washn.

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And afterwards, to-wit, on the 19th day of Dec., 1894, there was duly filed in said court, in this cause, a Stipulation in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the District of Washington, Western Division.*

CHESTER H. KIEHL, as Receiver of The South Bend Water Company, vs. CITY OF SOUTH BEND.	}	No. 355.
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### **Stipulation Extending time to Answer.**

It is hereby stipulated between the parties, by their attorneys that the defendant shall have time until January 1, 1895, inclusive, within which to answer the complaint on file herein and that the defendant shall then plead issuably to the complaint on the facts.

LICHTENBERG, SHEPARD & LYON,  
Plaintiff's Attorneys.

W. B. STRATTON,  
Defendant's Attorney.

Dated Dec. 5, 1894.

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And afterwards, to-wit, on the 3rd day of January,

1895, there was duly filed in said court, in this cause, an Answer in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the District of  
Washington, Western Division.*

CHESTER H. KIEHL, as Receiver	}	No.
of The South Bend Water Company,		
Plaintiff,		
vs.		
THE CITY OF SOUTH BEND.	}	
Defendant.		

### Answer.

The answer of the above-named defendant to the bill of complaint of the above-named plaintiff.

#### I.

Denies each and every allegation, matter and thing set forth and contained in said complaint, except such as are hereinafter admitted or otherwise denied.

#### II.

Denies the first paragraph set forth and contained in said complaint and each and every allegation, matter and thing therein contained.

#### III.

Admits the second paragraph set forth in said complaint.

#### IV.

Denies the third and fourth paragraphs set forth in

said complaint, and each and every allegation, matter and thing therein contained.

V.

Denies each and every allegation, matter and thing contained in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action mentioned and set forth in said complaint and each and every allegation, matter or thing set forth in each and every paragraph thereof.

VI.

For a separate and further answer to the first cause of action set forth in plaintiff's complaint, and to each and every allegation, matter and thing therein contained, and to each paragraph thereof, defendant alleges:

That on the 3rd day of April, 1893, The City of South Bend, defendant herein, passed an ordinance entitled "An ordinance authorizing The South Bend Water Company, its successors and legal representatives and assigns, to construct, maintain and operate water works, to supply the city of South Bend, Washington, and its inhabitants with water for fire protection and other public purposes, and repealing ordinance No. 100 relating thereto."

That as provided therein plaintiff did, within the time therein limited, and in the manner therein prescribed, avail itself of the provisions of said pretended ordinance whereupon the said pretended ordinance became and constituted a pretended contract between the plaintiff and defendant.

That The City of South Bend, on said 3rd day of April,

1893, and for a long time prior thereto, was, and from the said 3rd day of April, 1893, up to the time of the commencement of this action continued to be, and still is, otherwise indebted in an amount exceeding one and one-half per centum of all the taxable property in The City of South Bend, defendant herein, ascertained from the last assessment in said city prior to the said 3rd day of April, 1893, for city purposes and hence had no power to incur the obligations set forth in said first cause of action, but that said pretended ordinance and said pretended contract were and are wholly unconstitutional and void, and utterly and entirely inoperative for any purpose, and of no valid force whatever.

That though the indebtedness of the said defendant before, at the time and ever since April 3rd, 1893, over and exclusive of the amount of indebtedness which might arise under said pretended ordinance and contract was and still is, far exceeding one and one-half per centum of all the taxable property in the said city of South Bend, as ascertained from the last assessment in said city prior to said April 3rd, 1893, for city purposes, yet the said pretended ordinance did not provide for its submission to the vote of the people of said city, nor has the same in fact ever been submitted, or attempted or pretended to be submitted, to a vote of the people of said city, nor has said pretended ordinance or contract ever received the assent of three-fifths of the voters of said city voting at any election held for that purpose.

That no ways or means were provided in said pretended ordinance for the payment of the debts or liabilities therein attempted to be created or which might arise

thereunder or the pretended indebtedness mentioned in plaintiff's first cause of action.

## VII.

For another and separate defense to the said first cause of action in plaintiff's complaint contained, defendant alleges:

That the indebtedness of the said city of South Bend before, at the time and ever since October 1st, 1893, over and exclusive of the amount of indebtedness set forth and contained in said first cause of action, was ever since has been, and still is, far exceeding one and one-half per centum of all the taxable property in the city of South Bend, ascertained from the last assessment in said city prior to said 1st day of October, 1893, for city purposes.

That though the indebtedness of said city before, at the time, and ever since October 1st, 1893, over and exclusive of the amount of indebtedness set forth in said first cause of action, was and still is far in excess of one and one-half per centum of all the taxable property in said city of South Bend, as ascertained from the last assessment in said city prior to said October 1st, 1893, for city purposes, yet the said indebtedness set forth in plaintiff's first cause of action has never been submitted or pretended to be submitted to a vote of the people of said city, nor has said pretended indebtedness ever received the assent of three-fifths of the voters of said city voting at any election held for that purpose.

## VIII.

For a further and separate defense to said first cause of action, the defendant alleges:

That there is not now and never has been any money in the treasury of said city that could be applied in payment of the pretended indebtedness set forth in the first cause of action, or to pay any indebtedness which might arise under the said pretended ordinance and contract.

#### IX.

For a further and separate defense to the said first cause of action, defendant alleges:

That the current revenues of said city for the fiscal year of 1893, and up to the next regular assessment for city purposes thereafter did not exceed the sum of \$4543.20; that prior to the said first day of October, 1893, all and every part of said sum had been and was appropriated and paid out of the treasury of said city, on other legal indebtedness and obligations against said city, and at the time of the accruing of said pretended indebtedness set forth in said first cause of action there were no current revenues of said city that could be or were appropriated for the payment of said pretended indebtedness.

#### X.

For a further and separate defense to said first cause of action, defendant alleges: That the annual revenue of said city after meeting the necessary other liabilities of said city, is insufficient to meet the alleged and pretended indebtedness mentioned in said first cause of action.

#### XI.

And for a further and separate defense to said first cause of action, defendant alleges: That on the 17th day

of October, 1893, at South Bend, Washington, defendant made and executed, and on the 13th day of November, 1893, delivered to the said plaintiff, according to the terms of said pretended ordinance and contract, a warrant upon the general fund of said city for the sum of \$180.00 in discharge of the pretended indebtedness set forth in said first cause of action, and said plaintiff, at the time of said delivery aforesaid, accepted said warrant in full satisfaction and discharge thereof.

[The twelfth to the fortieth paragraphs of the answer are omitted under stipulation. Precisely the same six separate defenses as are above stated to the first count of the complaint are stated in these omitted paragraphs to the successive causes of action set forth in the corresponding counts of the complaint down to the sixth count, inclusive. The only changes are the appropriate and necessary changes as to dates, &c.]

## XLI.

For a separate and further answer to the said seventh cause of action mentioned and set forth in said complaint, defendant alleges: That on the 3rd day of April, 1893, the city of South Bend passed an ordinance entitled, "An ordinance authorizing The South Bend Water Company, its successors, legal representatives and assigns, to construct, maintain and operate water works to supply the city of South Bend, Washington, and its inhabitants with water for fire protection and other public purposes, and repealing ordinance No. 100 relating thereto."

That as provided therein, plaintiff did within the time therein limited and in the manner therein prescribed,

avail itself of the provisions of said pretended ordinance, whereupon the said pretended ordinance became and constituted a pretended contract between the plaintiff and defendant.

That The City of South Bend, on the 3rd day of April, 1893, and for a long time prior thereto was, and from said 3rd day of April 1893, up to the time of the commencement of this action continued to be, and still is otherwise indebted in an amount far exceeding one and one-half per centum of all the taxable property in said city ascertained from the last assessment in said city prior to the said 3rd day of April, 1893, for city purposes; and hence had no power to incur the obligations set forth in said seventh cause of action, but that said pretended ordinance and contract were and are wholly unconstitutional and void, and utterly and entirely inoperative for any purpose and of no valid force whatever.

That though the indebtedness of said city before, at the time, and ever since April 3rd, 1893, over and exclusive of the indebtedness which might arise under the said ordinance and contract, was and still is, far exceeding one and one-half per centum of all the taxable property in said city ascertained by the last assessment prior to said April 3rd, 1893, for city purposes, yet the said pretended ordinance and contract did not provide for its submission to a vote of the people of said city nor has the same in fact ever been submitted to a vote of the people of said city, nor has said pretended ordinance and contract ever received the assent of three-fifths of the voters of the said city voting at any election held for that purpose.



That no ways or means were provided in said pretended ordinance for the payment of the debts or liabilities therein sought to be created or which might arise under the said pretended ordinance and contract.

#### XLII.

For another separate and further defense to the said seventh cause of action, defendant alleges: That the indebtedness of the said city of South Bend, over and exclusive of the indebtedness set forth in said seventh cause of action, before, at the time and ever since April 1st, 1894, was and still is over and far exceeding one and one-half per centum of all the taxable property in said city ascertained from the last assessment prior to said April 1st, 1894, for city purposes.

That though the indebtedness of said city before, at the time and ever since April 1st, 1894, over and above the amount of indebtedness set forth in said seventh cause of action, was and still is far exceeding one and one-half per centum of all the taxable property in said city ascertained by the last assessment prior to the said April 1st, 1894, for city purposes, yet the said pretended indebtedness set forth in said seventh cause of action has never been submitted to a vote of the people of said city, nor has said pretended indebtedness ever received the assent of three-fifths of the voters of said city voting at any election held for that purpose.

#### XLIII.

For a further and separate defense to the said seventh cause of action set forth in said complaint, defendant alleges:

That there is not now and never has been any money in the treasury of said city that could be applied in payment of the pretended indebtedness set forth in said seventh cause of action, or to pay any indebtedness which might arise under the said pretended ordinance or contract.

#### XLIV.

For another and separate defense to the said seventh cause of action, defendant alleges: That the current revenues of said city for the fiscal year of 1893, and up to the 7th day of November, 1894, the date of the next regular assessment and levy after the assessment of the year 1893, did not exceed the sum of \$4543.20; that prior to the said April 1st, 1894, all and every part of the said sum had been and was appropriated and paid out of the treasury of said city upon other legal obligations of said city, and that at the time of the accruing of the said pretended indebtedness mentioned in said seventh cause of action, there were no current revenues that could be or were appropriated or used for the payment of said pretended indebtedness.

#### XLV.

For another and separate defense to the said seventh cause of action, defendant alleges: That the annual revenue of said city, after meeting the other necessary expenses and obligations of said city, is insufficient to meet the alleged and pretended indebtedness set forth in said seventh cause of action.

[Paragraphs 41 to 45, both inclusive, set up, essentially in the same form and in the same order, the first five defenses pleaded to each of the first six causes of action;

paragraphs 46 to 50, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the eighth cause of action which paragraphs 41 to 45, both inclusive, set up to the seventh cause of action.

Paragraphs 51 to 55, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the ninth cause of action.

Paragraph 56 sets up by reference the same five defenses to the 10th cause of action as paragraphs 51 to 55, both inclusive, set up to the ninth cause of action.

Paragraphs 57 to 61, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the eleventh cause of action.

Paragraphs 62 to 66, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the twelfth cause of action.

Paragraphs 67 to 71, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the thirteenth cause of action.

Paragraphs 72 to 77, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the fourteenth cause of action.

Paragraphs 78 to 82, both inclusive, set up the like five defenses in the same order and essentially in the same form, with appropriate changes, to the fifteenth cause of action.]

Wherefore, defendant demands that the plaintiff take nothing by this said action but that the same be dismissed, and that the defendant have its costs and disbursements in this action most wrongfully sustained.

W. B. STRATTON and JOHN T. WELSH,  
 Defendant's Attorneys,  
 Office and P. O. Address, South Bend, Washington.

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And afterwards, to-wit, on the 22nd day of January, 1895, there was duly filed in said court, in this cause, a Reply, in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the District of  
 Washington, Western Division.*

CHESTER H. KIEHL, as Receiver of The South Bend Water Company, vs.	} No. 355.
THE CITY OF SOUTH BEND.	

### Reply to Answer.

The reply of the plaintiff to the answer respectfully shows that:

#### I.

The plaintiff denies that The City of South Bend, on April 3, 1893, or prior thereto, was indebted to an amount exceeding one and one-half per cent of all the taxable property therein, ascertained from the last prior assessment in said city for city purposes, as alleged in the sixth paragraph of the answer to the first cause of

action; and this paragraph is pleaded to the same defense which is set up in said answer against each of the causes of action in the complaint after the first, the same as if this paragraph were repeated in reply to each of the corresponding paragraphs of the answer.

## II.

The plaintiff alleges that the ordinance No. 118 of the city of South Bend, passed April 3, 1893, which is pleaded in the sixth paragraph of the answer, was made as a continuation, renewal and modification of a certain prior ordinance of said city, No. 100, passed August 31, 1891, which prior ordinance granted in terms nearly identical, and to the same legal effect, the same franchise to said, The South Bend Water Company, as is contained in said ordinance passed April 3, 1893, and also contracted by its terms with said water company for supply of water to said city for fire purposes for the same term of thirty years from fifty hydrants at the same rental; that said water company having been prevented by unforeseen contingencies within the terms of said prior ordinance from completing its works within the time thereby limited, said city thereupon claimed that the franchise and contract thereby granted and made had become void; and said company, and Solomon Oppenheimer, Berthold Goldsmith, P. Goldsmith and Horace Phillips, as mortgagees and assigns of its property and of said contract and franchise, claimed that said franchise, contract and rights thereunder had not been forfeited, and that said water company was still entitled to complete its works and supply water to said city and receive rents therefor under the terms of said prior ordinance; and thereupon a suit

was brought in this court by said mortgagees against said city, which was numbered 182, for the purpose of enjoining said city from interfering with said water company and preventing it from completing its works and supplying water to said city; and thereafter, on or about April 1, 1893, said suit was compromised and said city abandoned its said claim that said franchise and contract had been forfeited and annulled, and by way of compromise between the parties it was agreed that a new ordinance in virtually the same terms should be passed, except that the number of hydrants so to be supplied and rented to said city should be twenty-five instead of fifty, and said ordinance passed April 3, 1893, was passed in pursuance of said compromise and agreement, and as to the rights and liabilities herein involved is in effect only a continuation of said prior ordinance. And the plaintiff further says in this behalf that at the time of the passing of said prior ordinance and at all times from then until April 3, 1893, and thereafter, said city was not indebted in a sum exceeding one and one-half per cent of its then total assessed valuation; and that the assessed valuation of all property in said city during the year 1892, and until on or about October 1, 1893, was \$2,119,562.00, and that all of the indebtedness of said city during said period, except a certain bonded debt of \$60,000 which was authorized by vote of the citizens of said city in 1891, and which was no part of the indebtedness within the lawful limit of one and one-half per cent of the assessed valuation, was less than twenty-five thousand dollars (\$25,000); and this paragraph is pleaded to the same defense which is set up in said answer against each of the causes of action in

the complaint after the first, the same as if this paragraph were repeated in reply to each of the corresponding paragraphs of the answer.

### III.

The plaintiff denies that the indebtedness of the defendant at and ever since October 1, 1893, exclusive of the indebtedness set forth in the first cause of action, has been and is in excess of one and one-half per cent of all the taxable property in said city, ascertained from the last assessment therein prior to October 1, 1893, for city purposes, as alleged in the seventh paragraph of the answer in defense to the first cause of action; and this paragraph is pleaded to the same defense which is set up in said answer against each of the causes of action in the complaint after the first, the same as if this paragraph were repeated in reply to each of the corresponding paragraphs of the answer.

### IV.

The plaintiff denies each and every allegation of the eighth paragraph of the answer in defense to the first cause of action; and this paragraph is pleaded to the same defense which is set up in said answer against each of the causes of action in the complaint after the first, the same as if this paragraph were repeated in reply to each of the corresponding paragraphs of the answer.

### V.

The plaintiff says that he has no knowledge or information sufficient to form a belief as to any of the allegations of paragraph nine of the answer, which is pleaded

in defense to the first cause of action, and he therefore denies the same; and this paragraph is pleaded to the same defense which is set up in said answer against each of the causes of action after the first, the same as if this paragraph were repeated in reply to each of the corresponding paragraphs of the answer.

## VI.

The plaintiff says that he has no knowledge or information sufficient to form a belief as to the allegation in the tenth paragraph of the answer which is pleaded in defense to the first cause of action, and he therefore denies the same; and he says further in this behalf that the liability of the defendant which is set up in the first cause of action is a current expense of said city, lawfully contracted as hereinbefore set forth, which it is bound to pay and discharge, as the same is incurred, and accrues and becomes payable from time to time, irrespective of the amount of indebtedness of the defendant, legal or illegal, previously contracted, and that such liability is no part of the indebtedness within the purview of the provisions of the constitution of said State prohibiting the incurring of indebtedness beyond the limit of one and one-half per cent of the assessed valuation of the taxable property of said city; and this paragraph is pleaded to the same defense which is set up in said answer against each of the causes of action in the complaint after the first, the same as if this paragraph were repeated in reply to each of the corresponding paragraphs of the answer.

## VII.

The plaintiff admits that on October 17, 1893, at said



South Bend, the defendant made and executed, and on November 13, 1893, delivered to said water company, according to the terms of said ordinance and contract, a warrant upon the general fund of said city for the amount of rental in suit in the first cause of action of the complaint, as alleged in the eleventh paragraph of the answer in defense to said first cause of action; but he denies each and every other allegation of said eleventh paragraph, and further says in this behalf that said warrant was made, delivered and received merely as an evidence of indebtedness and a convenient form of establishing the amount and date thereof, and not in satisfaction of the original debt or liability of the defendant for said rentals for the month in question, and that such was the intent and understanding of the parties thereto; and he further says that by virtue of the proceedings set forth in the complaint with relation to his appointment and qualification as receiver, and a transfer of said water company's rights and assets to him, said warrant has been duly transferred to him, he is now the lawful owner and holder thereof, that no part has ever been paid to said water company or to him, nor has the same ever been transferred to any other person, and he is now ready to produce the same at the trial, as the Court may direct, and surrender the same to the defendant upon payment of the amount due to him under said first cause of action and this paragraph is pleaded to the same defense which is set up in said answer against the second, third, fourth, fifth and sixth causes of action in the complaint, the same as if this paragraph were repeated, with the proper changes of date and amount, according to the



And afterwards, to-wit, on the 27th day of February, 1895, there was duly filed in said court, in this cause, a Waiver of Trial by Jury, in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, District of Washington, N. D.*

CHESTER H. KIEHL, as Receiver of The South Bend Water Company, vs. THE CITY OF SOUTH BEND.	}	No. 355.
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**Stipulation Waiving Trial by Jury.**

The parties, by their respective attorneys, hereby waive a trial by jury herein, and consent that the action be tried and decided by the District Judge presiding, without a jury.

LICHTENBERG, SHEPARD & LYON,

Plaintiff's Attorneys.

JOHN T. WELSH,

Defendant's Attorney.

Dated February 27, 1895.

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And afterwards, to-wit, on the 3rd day of Dec., 1895, there was duly filed in said court, in this cause, Findings of Fact, in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the District of  
Washington, Western Division.*

CHESTER H. KIEHL, as Receiver of The South Bend Water Company, vs. THE CITY OF SOUTH BEND.	}	No. 355.
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### Findings.

This action was tried before the Court, without a jury, a trial by jury being waived in writing, on February 25, 1895, and after consideration of the evidence and of the arguments of counsel the court now makes the following findings of fact and conclusions of law:

#### Findings of Fact.

1. The South Bend Water Company is and has been since August 30, 1891, a domestic corporation under the laws of Washington, located and having its principal place of business at Seattle, in King county, in said district, and empowered to construct and operate water works for public and private supply at the city of South Bend in said district; and during that period has been engaged by itself or through its receiver in operating such works and supplying water to said city and its inhabitants.

2. The defendant then was and during said period has been a municipal corporation of said State, in Pacific county in said district and division, with the usual powers of cities, including that of contracting for the supply of water for fire and other public purposes.

3. The plaintiff was duly appointed in a suit for foreclosure of mortgages and other purposes in this court between parties of diverse citizenship, adequate to federal jurisdiction, and became and has continued to act as the receiver of said company, by the order of this Court as and when pleaded in the complaint, and upon qualifying, all the rights and assets of the company were duly transferred to him as ordered by this Court. The receiver was duly authorized by this Court to bring this action, as pleaded in the complaint. The amount in controversy exceeds two thousand dollars.

4. On August 31, 1891, the defendant, by its ordinance No. 100, conferred on the company a franchise to build and operate water works in said city, on terms and conditions therein stated, and by the same ordinance agreed to pay to the company a rental of seven 50-100 dollars per month, during the term of thirty years, which was the term of the franchise, for each of fifty hydrants to be put in by the company, which rental was to be paid each month for the number of hydrants in good order during the preceding month, by the proceeds of a sufficient tax to be levied and collected annually on all property in the city, to be an irrevocable tax during the life of the franchise, and the proceeds to be kept in a separate so-called "water fund." The company, within due time and on or about September 30, 1891, accepted said franchise and agreement.

5. On April 3, 1893, litigation having ensued between the city and the company regarding the company's timely and sufficient construction of its works and compliance with the terms of the franchise, the litigation was compromised and settled by verbal arrangement that a

new ordinance limiting the number of rented hydrants to twenty-five and such others as the city should choose to order, at the same rental, for the same term, should be passed as a substitute for said ordinance No. 100. Such ordinance, known as No. 118, was accordingly so passed on said date and the litigation was dismissed. The new ordinance contained a repeal of all prior ordinances on the subject, but was understood by all concerned to be a substitute for No. 100 and was in terms nearly identical and in all material respects identical with No. 100, except as to the number of hydrants and except in the provision for paying rental which was that "said rental shall be paid by warrants drawn on the general fund of said city, and a sufficient tax shall be levied and collected annually upon all taxable property in said city to meet the payments for hydrants rented, as herein provided, which tax shall be irrevocable during the continuance of the franchise herein granted." The new ordinance was accepted by the company in due time on or about April 30, 1893, and its works were duly constructed and set in operation, and thenceforward until on and after November 1, 1894, were kept in operation.

6. The company erected twenty-four hydrants, as when and where required by ordinance No. 118, and by itself or through its receiver kept them in good order and supplied water to them, and through them to the city, from July 7, 1893, to November 1, 1894. The agreed rental for that period is twenty-eight hundred thirty nine and 40-100 dollars.

7. The company and the receiver for it have accepted warrants of the city drawn in the usual form on the gen-

eral fund for the rentals for the months from July, 1893, (24 days) to March, 1894, inclusive; which warrants were for the total sum of fifteen hundred seventy-nine and 40-100 dollars. The warrants for July and August, 1893, were not sued on herein. The warrants for the months from September, 1893, to March, 1894, both inclusive, are in suit. No warrants have been issued or accepted for the months from April, 1894, to October, 1894, both inclusive. The rentals for those months are twelve hundred sixty dollars and are all in suit herein.

8. The assessed valuation of the city on May 29, 1891, when the last regular assessment for city purposes before the passage of ordinance No. 100 was made, was \$2,868,-825.00, and there was no known extant indebtedness then; the next regular assessment for city purposes was \$1,908,478.00, and was made on June 2, 1892, and the then general city debt (exclusive of \$60,000 bond indebtedness, which had been duly voted and issued in June, 1891, and were to run for fifteen years, under the constitutional provision allowing municipal indebtedness to be incurred by popular vote to the amount of five per cent of the assessed valuation, for general city purposes) less the cash in the treasury, was \$10,035.73; the next regular assessment for city purposes was \$520,138 and was made on October 16, 1893, and the then general city debt (exclusive of said \$60,000 bond indebtedness, which ever since June, 1891, was and still is an indebtedness of said city), less the cash in the treasury, was \$21,536.61; the next regular assessment for city purposes was \$525,258 and was made on October 1, 1894, and the then general city debt (exclusive of said \$60,000 bond indebtedness), less the cash in the treasury, was \$26,421.51.

9. The amount of general city debt, exclusive of the \$60,000 bond indebtedness mentioned in the preceding finding, which was unpaid as evidenced by outstanding warrants, less the cash in the treasury on the first day of each month, from April 1, 1894, to November 1, 1894, both inclusive, being the period for which the rentals in suit, for which no warrants have been issued, were claimed, was as follows:

April 1, 1894, Net debt, less cash.....	\$27,956 35
May 1, " " " " " .....	26,481 91
June 1, " " " " " .....	26,097 12
July 1, " " " " " .....	26,051 54
Aug. 1, " " " " " .....	26,196 54
Sept. 1, " " " " " .....	26,151 83
Oct. 1, " " " " " .....	26,421 51
Nov. 1, " " " " " .....	26,562 01

10. Neither said ordinance No. 100 nor said ordinance No. 118 provided for its submission to the vote of the electors or voters of said city, and neither ordinance has ever received the assent of three-fifths of the voters of said city, voting at any election for that purpose or at all. Neither ordinance contained any provision for the payment of the indebtedness thereby agreed to be incurred, other than the provisions above stated in the fourth and fifth findings. Said company and receiver supplied water to the defendant under said ordinances and under no other ordinance or contract.

11. During none of the months mentioned in the ninth finding was there any money in the treasury of the defendant to apply in payment of any of the water rentals in suit for the corresponding months, after paying the



other expenses of the city for those months respectively, and other liabilities of prior date.

12. The annual and current revenues of the defendant during all of the period from April 1st to October 31st, 1894, both inclusive, after meeting the necessary and lawful expenses of the city (exclusive of the water rentals) for that period and the liabilities of the city of prior date, were insufficient to pay said alleged indebtedness for said rentals.

13. The defendant has refused to issue and deliver to the plaintiff or said company warrants for any of said months from April to October, 1894, both inclusive.

14. For the years 1893 and 1894, and each of them, the city levied on the assessed valuation of all the real and personal property within the city, subject to taxation, a tax of 60 cents on each one hundred dollars for general fund purposes.

15. When ordinance No. 100 was passed, and thence until after the next assessment, on June 2, 1892, the general city debt, exclusive of the \$60,000 bond issue, was not in excess of the constitutional limit of one and one-half per cent of the assessed valuation, but inclusive of said bond issue, was in excess of said limit. During said period the general city debt and bond debt together were not in excess of the constitutional limit of five per cent under authority of popular vote. Under the assessment of June 2, 1892, and thence until the next assessment on October 16, 1893, the general city debt, exclusive of said bond debt, was not in excess of one and one-half per cent of the assessed valuation on June 2, 1892, nor was the bond debt in excess of three and one-half per cent thereof, nor

the total general and bond debt in excess of five per cent thereof. Under the assessment of October 16, 1893, the general debt exclusive of the bond debt was in excess of the one and one-half per cent limit, and the bond debt, apart from the general debt, was in excess of the three and one-half per cent limit. The same relation between the city's debts, general and bonded, and the assessed valuations from time to time have continued thenceforward throughout the period of the rentals in suit.

#### **Conclusions of Law.**

1. The plaintiff has legal capacity to sue herein and the Court has jurisdiction of the subject matter and of the parties.

2. The ordinance No. 100 by passage and acceptance became a valid contract between the city and the company in respect of hydrants and rentals, which contract was not abrogated but modified by the subsequent contract contained in ordinance No. 118. Said contract was a valid contract on its date, to-wit, on August 31, 1891, and is still. It did not create an indebtedness of the city for the entire period of thirty years or for any portion thereof, but only an obligation of the city to take the water and incur the debt from month to month as the water was furnished.

“When the increase of the city's debt and the decline of assessed valuation brought the city's general debt (exclusive of the \$60,000 bond debt by popular vote) to a point where the constitutional limit of one and one-half per cent of the assessed valuation was exceeded, the city's power to incur further debt under the contract became suspended and did or will so remain till the general debt

(exclusive of the \$60,000 bond debt) again falls within that limit." (Objected to by defendant.) The contract is not abrogated or invalidated, but the power to incur or pay new debt under it is suspended by the higher power of the constitution.

3. The warrants received by the company and the plaintiff were not payment for the rentals and were not accepted as such but were and are mere evidences of those debts.

4. No action can be brought at law on the warrants in suit, irrespective of the question of invalid and excessive debt, but the sole remedy on them is a mandamus to compel their payment when there are funds in the treasury to pay them or to compel levy of a tax to pay them.

5. The defendant is entitled to a judgment in abatement of this action as to the warrants in suit; that is, on the first, second, third, fourth, fifth, six and seventh causes of action in the complaint, but not dismissing the action on the merits as to them.

6. The defendant is entitled to a judgment of dismissal on the merits as to the rentals in suit from April, 1894, to October, 1894, both inclusive, that is, on the eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action, with costs.

Let a judgment be entered accordingly.

C. H. HANFORD,

District Judge.

Dated December 2nd, 1895.

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And afterwards, to-wit, on Tuesday, the 3rd day of Dec.,



months from July, 1893, to March, 1894, both inclusive, on the ground that warrants of the defendant for said rentals have been issued to said company and are held by the plaintiff, and he has another and exclusive remedy thereon; and that as to said causes of action the defendant go hereof without day.

And it is further adjudged that this action be dismissed as to the causes of action set forth in the eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth counts or causes of action in the complaint, to-wit, for the water rentals alleged to be due from the defendant for the months from April, 1894, to October, 1894, both inclusive, and that the plaintiff take nothing by this action and the defendant recover from him seventy-five and 10-100 dollars, its taxable costs and disbursements of the action, to be taxed by the clerk, and that it have execution therefor.

C. H. HANFORD,  
District Judge.

Dated December 3rd, 1895.

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And afterwards, to-wit, on the 7th day of Dec., 1895, there was duly filed in said court, in this cause, Exceptions of the Plaintiff to the Findings of the Court, in the words and figures as follows, to-wit:



constitution," because the same is contrary to law, and the Court did not find as requested that the contract embodied in ordinance No. 100, being a valid contract at its inception, remained a binding and legal charge and expense of the city which it was compellable to pay during the period of the contract.

4. To the fourth conclusion of law, because the same is contrary to the law.

5. To the fifth conclusion of law, because the same is contrary to the law.

6. To the sixth conclusion of law, because the same is contrary to the law.

CHARLES E. SHEPARD,  
Plaintiff's Attorney.

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And afterwards, to-wit, on the 10th day of December, 1895, there was duly filed in said court, in this cause, a Motion for a New Trial, in the words and figures as follows, to-wit:

*In the Circuit Court of the United States, for the District of  
Washington, Western Division.*

CHESTER H. KIEHL, as Receiver of The South Bend Water Company, vs. THE CITY OF SOUTH BEND.	} No. 355.
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**Motion for New Trial.**

Now comes the plaintiff, by Charles E. Shepard, his attorney, and moves for an order setting aside the judg-

ment and granting to the plaintiff a new trial herein on the following grounds of error committed by the Court in the trial and decision herein.

1. Error of the Court in the eleventh finding of fact, because it is contrary to the evidence and there is no evidence to sustain it.

2. Error of the Court in the twelfth finding of fact, because it is contrary to the evidence and there is no evidence to sustain it.

3. Error of the Court in that portion of the second conclusion of law which holds that the power of the defendant to incur debt for the supply of water from month to month pursuant to the contract between said company and the defendant, was suspended by the increase of the city's debt and the decline of its assessed valuation, because such conclusion is contrary to law.

4. Error of the Court in the fourth conclusion of law, because it is contrary to law.

5. Error of the Court in the fifth conclusion of law, because it is contrary to law.

6. Error of the Court in the sixth conclusion of law, because it is contrary to law.

This motion is based upon all the files and records herein and the minutes of the Court, and particularly upon the findings of the Court and of the plaintiff's exceptions thereto.

CHARLES E. SHEPARD,  
Plaintiff's Attorney.

Dated December 10, 1895.

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And afterwards, to-wit, on Wednesday, the 11th day of



December, 1895, the same being at Chambers of said court. Present, the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

CHESTER H. KIEHL, as Receiver of  
The South Bend Water Company,  
vs.  
THE CITY OF SOUTH BEND.

**Order Denying Motion for New Trial.**

Upon reading and filing the plaintiff's motion for a new trial, and upon due consideration thereof, and after hearing counsel,

It is ordered, that said motion be, and the same is hereby denied.

To which order the plaintiff duly excepts and the exception is allowed.

C. H. HANFORD,  
District Judge.

Dated December 11, 1895.

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And afterwards, to-wit, on the 2nd day of April, 1896, there was duly filed in said court, in this cause, the Opinion of the Court, in the words and figures as follows, to-wit:

CHESTER H. KIEHL, Receiver, }  
 vs. }  
 THE CITY OF SOUTH BEND. }

### Opinion.

I consider that the rights granted by ordinance No. 118 were founded upon and in consideration of the pre-existing rights of the water company under ordinance No. 100, and that the effect of ordinance No. 118 was not to abrogate nor to limit the rights of the water company, except in so far as the provisions of ordinance No. 118 are different and less favorable to the water company than the rights granted by ordinance No. 100.

I hold that the contract, whether it is viewed as being based entirely upon ordinance No. 118, or as being based upon the two ordinances, is a valid contract. It is not in violation of the provisions of the constitution of this State limiting the power of municipal incorporations to incur indebtedness, because it does not create any indebtedness.

The contract for future supplies, to be paid for when received does not create an indebtedness. The indebtedness does not exist until the supplies are received.

The indebtedness in the case of the city of South Bend to the water company is only for the contract rate for the water during the time that it was supplied by the water company to the city, and each month that water was supplied at the end of the month there was an indebtedness for the amount which accrued for the water supplied during that month, at the contract rate.

The reason the city is not liable for the water that has been supplied after it became indebted in an amount exceeding the constitutional limitation, is that by reason of the shrinkage in value of the taxable property within the city and the incurring of the indebtedness in carrying on the city, this excess of indebtedness had been created; it had been created in two ways, by the incurring of debt and by the shrinkage in value of the taxable property of the city. That does not necessarily invalidate the contract. It does incapacitate the city from performing the contract while this excess of indebtedness continues. The city is unable to pay for the water according to its contract without violating the constitution of the State, and that situation having arisen, the provisions of the constitution are paramount to the obligations of the contract; and on that ground I hold that the city cannot be required to pay it.

I hold also that no action can be maintained for the amount of water that was supplied to the city and for which warrants have been issued, upon the authority of the supreme court of this State in the Sumas City case. The result of a judgment in such a case will be simply to require a warrant to be issued, and warrants having already issued the action is not necessary. The only remedy a party can have who has received a warrant for the amount of an indebtedness is a mandamus to compel the payment of the warrant when there are funds, or a mandamus to compel the levy of a tax to raise funds. If it is a case in which it is the duty of the city to levy a tax to meet an expense of that kind, proceedings by mandamus would lie and be the proper remedy.

I have not intended to hold that the warrants were received as satisfaction of the debt; the warrants are mere evidences of the debt, and not payment nor satisfaction.

I think the findings ought to be made specific so as to show the condition of the city as to the amount of indebtedness at date of ordinance 100, and also at date of ordinance 118, and the aggregate of the amount of taxable property, as shown by the last preceding assessment roll, after being equalized. You have some statements in evidence in the case that show those figures, and those figures as shown in that statement should be incorporated in the findings so that the Court of Appeals will have the precise facts, and not your conclusions, as to the financial condition of the city.

*Mr. Welsh.* Will your Honor incorporate this in the findings:

“That there is not now, and never has been since the 3rd day of April, 1893, any money in the treasury of the said city that should be applied in payment of any of the indebtedness alleged in the 15 causes of action in plaintiff’s complaint, and that alleged in any cause of action therein;”

“That the annual and current revenues of The City of South Bend, defendant, after meeting the necessary expenses and liabilities of said city, was at all the times in plaintiff’s complaint mentioned, and since the 3rd day of April, 1893, continued to be and are now insufficient to meet or pay the indebtedness alleged in the plaintiff’s complaint, or that alleged in any cause of action therein.”

*The Court.* I will make those findings with this exception, instead of mentioning the 3rd day of April, 1893,



ted in this bill of exceptions at the instance of the plaintiff, in order that the same may be made of record.

Counsel for defendant moves the Court to dismiss the action for the following reasons:

1st. Because the Court has not now, and never had, jurisdiction of the subject matter of this action, nor of the defendant.

2nd. Because the pleadings on file herein do not show plaintiff and defendant to be citizens of different states, nor of foreign states, and

3rd. Because this is a civil action arising upon an alleged contract between citizens of the State of Washington, and there is no federal question involved herein.

Which motion the Court denied; defendant excepts, exception allowed.

It was thereupon stipulated and agreed that public records introduced in evidence on the trial might be withdrawn and certified copies thereof substituted for all the purposes of this case.

The following admissions were then made by counsel for defendant:

Defendant admits paragraph one of plaintiff's complaint and also paragraphs three and four, except that it does not admit any legal conclusion therein stated, nor does it admit, as a conclusion of law from any facts therein stated, that the plaintiff by virtue of those facts has acquired any right to supply water to the defendant, or to collect from it compensation therefor. The defendant expressly reserves here and throughout this admission, the right to insist that no valid indebtedness of the plaintiff or The South Bend Water Company has been created,

and nothing in this admission shall be taken as a waiver of that contention.

Plaintiff offers in evidence certified copy of ordinance No. 100 of South Bend.

Defendant objects to the introduction of the instrument, because no foundation has been laid and because it is immaterial and irrelevant.

Instrument admitted in evidence, subject to objection, marked "Plaintiff's Exhibit A," and is as follows:

**Plaintiff's Exhibit "A," Ordinance No. 100.**

An ordinance authorizing The South Bend Water Company, their heirs, legal representatives and assigns, to construct, maintain and operate water works to supply the town of South Bend, Wash., and its inhabitants with water, contracting with said town of South Bend for water for fire protection and repealing ordinance No. 76 relative thereto.

Be it ordained by the Council of the town of South Bend:

Section 1. That The South Bend Water Company, a corporation duly organized and existing under the laws of the State of Washington, hereinafter called the grantees, the heirs, legal representatives and assigns, be and they are hereby authorized and empowered to build, construct, maintain and operate water works in the said town of South Bend to supply the said town and its inhabitants with water for domestic, sanitary and fire protection, manufacturing and other purposes, and to charge and collect tolls and rents therefor, and for that purpose to enter upon, use and occupy the necessary parts of streets and alleys, squares, bridges and other public

grounds of said town subject to the provisions hereinafter contained.

[Sec. 2 omitted under stipulation. It merely imposed the rule of due diligence on the grantee and prohibited unnecessary obstruction of traffic in construction of its works, and required it to restore the streets and public places to their former condition and indemnify the city against damages.]

Sec. 3. There shall be connected with said water works fifty (50) double nozzle fire hydrants, with standard, two and one-half ( $2\frac{1}{2}$ ) inch hose nozzles, which said hydrants shall be located at such points on said pipe lines as the common council may designate, said pipe line in said town of South Bend shall be constructed of iron or steel pipes, ranging in size from four to fourteen inches or more, the main on Water street to be not less than eight inches.

Sec. 4. Said water works shall be so constructed that they shall be able to furnish to said town and its inhabitants an adequate supply of good, wholesome water for domestic, sanitary and manufacturing purposes, and so they shall be able to furnish for fire protection six fire streams from any six hydrants, each stream using one hundred feet of two and one-half ( $2\frac{1}{2}$ ) inch hose with one inch ring nozzle, and said stream shall reach a vertical height of sixty (60) feet in still air.

Sec. 5. Said fire hydrants shall be used for fire protection only, provided that the fire department of said town shall have the right to use any one of said hydrants for practice, not exceeding once in any week, not exceeding one hour in any practice.

Sec. 6. The common council may at any time require said grantees, within a reasonable time after notice so to



do shall have been given them, to make extensions of the pipe system of said works not exceeding two miles in any one year, provided that there shall be placed and maintained on such extension fire hydrants at the rate of twelve (12) per mile.

[Sec. 7 omitted under stipulation. It required the grantee to furnish an adequate supply of water and fixed a tariff of charges for water to different classes of consumers or for different purposes.]

Sec. 8. The town of South Bend shall upon request of said grantees, their heirs, legal representatives and assigns, adopt and keep in force ordinances protecting the said grantees, their heirs, legal representatives and assigns, in the safe and unmolested enjoyment of the franchise hereby granted, and for the protection of their mains, pipes, fixtures and appurtenances, and against the pollution of the source of supply or of any reservoir of said grantees.

Sec. 9. In consideration of the benefits which shall be derived by the said town and its inhabitants from the construction and operation of the said water works, the franchise and license hereby granted to, and vested in, the said grantees, their heirs, legal representatives and assigns, shall remain in full force and effect for the term of thirty years from and after the passage and approval of this ordinance, subject, however, to a prior termination, by the right of purchase, as in the ordinance provided, and the town of South Bend hereby rents of the said grantees, their heirs, legal representatives and assigns, for the uses as provided in sections 4 and 5 of this ordinance, the fifty hydrants mentioned in section 3 of this ordinance,

and such other hydrants as may be put in upon the order of said town, or as provided in section 6 of this ordinance, for and during the term of the franchise under this ordinance, unless the term shall be sooner terminated, as herein provided.

Sec. 10. The town of South Bend agrees to use the said hydrants as provided in section 6 of this ordinance and to make good to the said grantees, their legal representatives and assigns, any injury which may happen to any of said hydrants when used by any officer or servant of the said town or any member of its fire department, and hereby agrees and promises to pay rental for said hydrants at the rate of \$7.50 per month for each hydrant rented by said town, as provided in section 9 of this ordinance, which rental shall be paid each month for the number of hydrants in good order during the preceding month, and a sufficient tax shall be levied and collected annually upon all taxable property in said town subject by law to such tax to meet the payments for hydrants rented as herein provided, which tax shall be irrevocable during the continuance of the franchise herein granted, and the proceeds of said tax shall be kept as a separate fund, to be known as the water fund, and shall be irrevocably and exclusively devoted to the payment of hydrant rentals under this ordinance and shall not be otherwise employed, except that any excess of said tax in any one year over the amount necessary to pay said rental for such year may be used for any purpose that said town may direct.

Sec. 11. This ordinance is passed upon the express condition and reservation that the town of South Bend reserves the right to itself to acquire of the said grantees, their heirs, legal representatives and assigns the said

water works and appurtenances, at the times and in the manner specified and the said grantees, their heirs, legal representatives and assigns, in accepting this ordinance, expressly covenant and agree that they will sell and convey to the town of South Bend the said water works and appurtenances at the time and in the manner specified.

Said right of purchase may be exercised by said town at the expiration of fifteen years from and after the acceptance of this ordinance by said grantees, if not exercised by that time, then at the expiration of twenty-three years thereafter, if not exercised at that time, then at the expiration of twenty-five years thereafter.

The said town shall give written notice to said grantees of their intention to purchase, at least six months prior to the date when the right may be exercised.

In event of said town and said grantees failing to agree upon a price, then the said town shall choose one appraiser, and the said grantees shall name one appraiser, and these two shall name a third, and the three appraisers so selected shall at once appraise the said water works, at its true cash value, and shall immediately, upon the completion of such appraisement, make a written report in duplicate, one copy of which shall be filed with the town clerk, and one copy delivered to the said grantees, and the said town clerk shall have the right within thirty days after the filing of the report of said appraisers with the town clerk to purchase the said water works at the value as determined by such appraisement.

In case said town shall decide to purchase such water works as aforesaid it shall within eight months from the time it so decides, pay the said grantees the amount of said valuation, as appraised, and upon such payment said

grantees shall convey to said town all their right, title, privileges and franchises in said water works and said water works together with all their appendages and appurtenances shall become and be the property of said town.

In case the sale of said water works is consummated the costs of the appraisement shall be equally divided between said town and said grantees but if the said town shall not purchase said works, upon said appraisal, then the said whole of costs shall be paid by said town.

Sec. 12. In order to avail themselves of the provisions of this ordinance, said grantees must within thirty days after its passage and approval file with the town clerk of said town a satisfactory bond in the sum of ten thousand dollars for the faithful performance of the obligations herein, and a written acceptance thereof duly acknowledged and from and after the filing and acceptance this ordinance shall have the effect of and be a contract between the said town of South Bend and said grantees, their heirs, legal representatives and assigns, and the said town upon the filing by said grantees of said acceptance and bond shall cause to be executed and delivered to said grantees a duplicate copy, duly signed and sealed, of this ordinance, provided that said grantees shall within three months after the filing of acceptance, begin the actual construction of said water works, and shall have said water works completed on or before twelve months after construction is begun, provided further, that should the said grantees be delayed in the construction of said works, by any cause over which they have no control, the said grantees shall be allowed an extension of time, equal to such delay.

[Sec. 13 omitted under stipulation. It merely repealed a certain previous ordinance granting a like franchise to other persons, and provided that this ordinance should take effect from its passage and publication.]

This ordinance shall take effect and be in force from and after its passage and publication.

Passed August 31, 1891.

Signed August 31, 1891.

CHAS. E. FOSTER,

Mayor.

Attest:

William F. Wallace, Clerk.

Defendant excepted to admission of said evidence. Exception allowed.

Plaintiff also offers in evidence certified copy of ordinance No. 118, of the town of South Bend, dated April 3rd, 1893.

Instrument received in evidence, marked "Plaintiff's Exhibit B," and is as follows:

**Plaintiff's Exhibit "B," Ordinance No. 118.**

An ordinance authorizing The South Bend Water Company, its successors and legal representatives and assigns, to construct, maintain and operate water works, to supply the city of South Bend, Washington, and its inhabitants with water, and contracting with the said city of South Bend for water for fire protection and other public purposes, and repealing ordinance No. 100 relating thereto.

[Sections 1-8 omitted under stipulation. So far as concerns the questions before this court, they are essentially the same as the corresponding sections in ordinance No. 100. The only material changes are these: Section 3 con-

tains a list of locations of 25 hydrants instead of the fifty before required. Section 4 contains additional requirements as to the height of the stream to be thrown at certain localities. Section 5 adds the city's right to use hydrants for street sprinkling and sewer flushing. Section 6 changes 2 miles to 3, and 12 hydrants to 8. Section 7 has a few trifling changes in rates. Section 8 is the same as section 8 of ordinance No. 100.]

Sec. 9. In consideration of the benefits which shall be derived by the said city and its inhabitants, from the construction and operation of the said water works, the franchise and license hereby granted to and vested in the said grantees, their successors, legal representatives and assigns, shall remain in full force and effect, for the term of thirty years from and after the passage and approval of this ordinance, subject, however, to a prior termination by the right of purchase, as in this ordinance provided, and the city of South Bend hereby rents of the said grantees, their successors, legal representatives and assigns for the uses as provided in sections four and five of this ordinance, the twenty-five hydrants mentioned in section three of this ordinance, and such other hydrants as may be put in upon the order of said city and such other hydrants as may be put in as provided in section six of this ordinance for and during the term of the franchise under this ordinance unless the term shall be sooner terminated as herein provided. It is hereby understood and agreed that the said city shall, as it increases the number of its hydrants, rent from the grantees, its successors and assigns, upon the terms herein stated in preference to any other party or parties, all such additional hydrants, until

the total number rented from the grantees shall have reached fifty.

Sec. 10. The city of South Bend agrees to use the said hydrants as provided in section six of this ordinance and to make good to the said grantees, its successors or assigns, any injury which may happen to any of said hydrants when used by any officer or servant of the said city, or any member of its fire department and hereby agrees and promises to pay rental for said hydrants at the rate of seven and fifty one-hundredths (\$7.50) dollars per month, for each hydrant, rented by said city as provided in section nine of this ordinance, which rental shall be paid monthly for the number of hydrants in good order during the preceding month, and said rental shall be paid by warrants drawn on the general fund of said city, and a sufficient tax shall be levied and collected annually upon all taxable property in said city to meet the payments for hydrants rented, as herein provided, which tax shall be irrevocable during the continuance of the franchise herein granted.

[Sec. 11 omitted under stipulation. It is the same as section 11 in ordinance No. 100, except for slight verbal changes.]

Sec. 12. In order to avail themselves of the provisions of this ordinance, said grantees must, within ten days after its passage and approval, file with the city clerk of said city a satisfactory bond in the sum of ten thousand dollars, for the faithful performance of the obligations herein and a written acceptance thereof and from and after said filing and acceptance this ordinance shall have the effect of, and be a contract between the said city of South Bend and said grantees, their successors, legal rep-

representatives and assigns, and the said city, upon the filing by said grantees of said acceptance and bond, shall cause to be executed and delivered to said grantees a duplicate copy duly signed and sealed, of this ordinance, provided that the said grantees shall within three months after the publication of this ordinance have said water works fully completed and in operation. Provided, that the hydrants located at the intersection of Quincy street and Dakota avenue may not be placed and in operation until one year from the date of the publication of this ordinance.

Sec. 13. Whenever the source of supply of water as at present projected shall become polluted, impure, unwholesome, inadequate, or when the city shall have increased the number of hydrants rented to fifty, and upon six months' notice in writing, the said grantees, its successors, legal representatives or assigns shall change said source of supply so that all points requiring water within the limits of said city shall be supplied with pure and wholesome water.

Sec. 14. Whenever the city shall establish, change or alter any street grade so as to disturb the pipe line of the grantees, as located thereon, then the said city shall relay said pipe at its own cost.

Sec. 15. That ordinance number 100 passed by the council of the city of South Bend on the 31st day of August, 1891, and entitled "An ordinance authorizing The South Bend Water Company, their heirs, legal representatives or assigns to construct, operate and maintain water works to supply the town of South Bend, Washington, and its inhabitants with water, contracting with the said town of South Bend for water for fire protection and re-



pealing ordinance No. 76 relative thereto," be and the same is hereby repealed.

This ordinance shall take effect and be in force from and after its passage and publication.

Passed by the City Council April 3rd, 1893.

Signed April 6, 1893.

[Corporate Seal]

THOMAS COOPER,

Mayor.

Attest: William Wallace, Clerk.

The plaintiff then called HORACE PHILLIPS, who being duly sworn, testified as follows:

I live in the suburbs of San Jose, California, and am now interested and have been for some time in The South Bend Water Company. I was not directly connected with the company in 1892, but as a creditor of it and was at South Bend during the year 1892.

Q. State whether or not the works of The South Bend Water Company were under construction in 1892?

Defendant objects as immaterial and irrelevant.

Evidence admitted subject to the objection, exception allowed.

A. They were, but were not completed in that year and there was also some interference with them by the city of South Bend, active opposition arising early in January, 1893, although the interference was commenced the last week in December, the ground being that the time for the construction of the works had expired. There was litigation in this court by the mortgagees claiming that they were entitled to an extension of time.

Q. Now, what was the result of this litigation?

Defendant renews objection as to all this testimony.

Evidence admitted subject to the objection, exception taken and allowed.

Progress of the work within the town limits was stopped by this arrest and also by an understanding with the officials that nothing would be done until some conclusion was come to by the suit. Soon after that when I was in California I was urged to come back to South Bend in order that some kind of an arrangement might be concluded with the town in order that the suit might be set aside. I went to South Bend, entered into negotiations and the result of it all was that this ordinance No. 118 was substituted for the original ordinance No. 100, by which the terms of the company were changed to some extent. I was there during these negotiations, which were conducted in the council chamber, and also a committee, the suit was then dropped and according to the new arrangement I think the water works were completed within 90 days and accepted by the city officials on a special trial having been made at that time, the terms having been complied with. They have been in operation ever since.

Plaintiff then offers in evidence the files of this court in case 182, particularly the stipulation of discontinuance, filed May 6th.

Considered subject to general objection, exception taken and allowed.

The water rentals up to November 1, 1894, is fourteen months with interest at 8 per cent, making a total of principal and interest due at the present time \$2,696.40.

*Cross-Examination.*

I am a member of The South Bend Water Company. I

understand that warrants have been received for eight months but they have not been received by me. I have handled them but have made no special record of them.

Witness is then shown certain papers.

Counsel for plaintiff admits that said papers are the warrants that represent the months from September, 1893, to March, 1894, inclusive.

Q. Mr. Phillips, under what ordinance are you suing now in this action?

Plaintiff objects as calling for a legal conclusion. Objection sustained.

Twenty-four hydrants were put in. Ordinance No. 118 was passed on April 3rd.

*Redirect Examination.*

In these negotiations there were concessions made on both sides, that being the object of coming together, to arrive at some compromise.

The plaintiff then offered in evidence the warrants covering the months from September, 1893, to March, 1894, inclusive, which were received in evidence and marked "Plaintiff's Exhibit C." The first of said warrants being for hydrant rentals for September, 1893, was as follows:

No. of Warrant 511. Gen. Fund Warrants.....	\$180
Series "B" Accrued Interest.....	\$

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South Bend, Wash. Oct. 17, 1893.

The Treasurer of the City of South Bend,

Pacific County, Washington.

Pay to South Bend Water Co. or order one hundred.

eighty and no-100 dollars, from the general fund of the city not otherwise appropriated, for water rates for Sept., 1893—24 hydrants at \$7.50 each.

(Signed) THOMAS COOPER, Mayor.

(Countersigned) J. A. Sharpe, Clerk.

[Endorsed]: Unpaid for want of funds, Oct. 21, 1893.  
W. H. Weller, Treasurer.

The others of said warrants are in the same form and were numbered, dated, for the amounts and months, and were presented and marked unpaid for want of funds, as shown by the following schedule:

No.	Dated.	Amount.	Month.	No. Hydrants.	Presented & Unpaid.
520	Nov. 28/93	180 00	Oct. 24	24	Dec. 2
534	Dec. 14/93	180 00	Nov.	24	Dec. 14
545	Jan. 9/94	133 10	Dec.	} 24	Jan. 10
546	" "	46 90	"		
568	Feb. 6/94	120 00	Jan.		Feb. 9
581	Mch. 6/94	180 00	Feb.	24	Mch. 8
598	Apl. 3/94	180 00	Mch.	24	Apl. 5

Plaintiff then offered a certified copy of a resolution of the City Council of South Bend, dated Dec. 23, 1892, which was received in evidence and marked "Plaintiff's Exhibit D."

Said Exhibit D is as follows:

"Whereas, by ordinance No. 100 of the town of South Bend, passed on the 31st day of August, 1891, The South Bend Water Company were granted certain rights and privileges for the construction of water works system in said town of South Bend, and,

Whereas, the part of the condition of the said franchise was that the said water company should com-

mence actual construction of said water works on or before the 22nd day of December, 1891, and have the said water works completed on or before twelve months after construction was begun, and

Whereas, said water company failed to commence actual construction of said water works by the time specified, and,

Whereas, the date which said water works were to be completed has expired and the system is not complete;

Therefore, be it resolved, by the Council of the city of South Bend that the franchise granted said South Bend Water Company by ordinance No. 100 is hereby declared canceled and all rights and privileges granted under the same are declared forfeited, and be it further

Resolved, that the clerk is hereby instructed to furnish the said South Bend Water Company with a copy of this resolution and to publish the same in the official papers of the city for one issue.

Signed this 23rd day of December, 1892.

{Seal of the City}  
{of South Bend.}

C. E. FOSTER, Mayor.

Attest: William F. Wallace, City Clerk.

It is admitted by counsel for defendant that the twenty-four hydrants were put in and the water furnished regularly.

The plaintiff then rested.

The defendant then moved that all of the testimony relative to ordinance No. 100 be *stricken* out, for the reasons before stated, and because it contradicts a written contract with the city.

Motion denied; exception taken and allowed.

The plaintiff thereupon made the following admission:

That the allegations of fact in paragraph VI of the answer as to the ordinance on April 3rd, 1893, and the acceptance thereof by The South Bend Water Company are true, but that the use of the word "pretended" in said paragraph shall not prejudice the plaintiff.

Plaintiff also admits that ordinance No. 118 of April 3rd, 1893, did not provide for a vote of the people, nor has it ever been submitted to a vote of the people, or approved by three-fifths of the resident voters and citizens of said South Bend.

Mr. H. M. FLINT, called for the defendant, being duly sworn, testified as follows:

I now hold the official position of deputy city clerk of South Bend, and as such officer I have the books and records of the city in my possession.

(Witness thereupon shown a schedule and asked to state whether or not he has compared that with the books in reference to the financial condition and the other matters therein stated.)

I have compared it with the books, having made this statement out, and to the best of my knowledge and belief it is a true and correct statement from those books and records of the city of South Bend.

Plaintiff admits that the assessed valuation, outstanding indebtedness and other facts, bearing upon the financial condition of the defendant on April 3rd, 1893, and sundry other dates, were as they are set forth in the schedule prepared by the witness and filed herein, and

Plaintiff also admits in regard to paragraph VII of the

answer that the indebtedness of the defendant on October 1, 1893, and all the taxable property in said city, according to the last assessment prior thereto, was as stated in said schedule above mentioned, and plaintiff admits as above in regard to submission of said ordinance to popular vote.

Plaintiff also admits in regard to paragraph VIII of the answer that the defendant has had an income for general city purposes as stated in the above-mentioned schedule and no more, and that all said income has been applied either to the payment of lawful current expenses, or to the payment of lawful warrants for general city purposes in the order of their issue from time to time, according as said income was received. And,

It is agreed that all warrants down to number 170, issued July 1, 1892, except a few of inconsiderable amount have been called and paid in the order of their issue, and all warrants down to No. 200 have been called. And

Plaintiff further admits in regard to paragraph IX of defendant's answer, that the current revenue of defendant for the fiscal year of 1893, for general city purposes was \$7421.16, and the total warrants of said year, including all warrants issued to The South Bend Water Company, being \$859.40, were \$14,791.44, and on October 1, 1893, there was no money in the city treasury for which a warrant for the water rentals for September, 1893, could be paid.

Also admitted by plaintiff in regard to paragraph X of the answer that all the annual revenue of the defendant from year to year, and all liabilities or debts which it has created or incurred, or attempted to create or incur from

year to year, are as stated in the above-mentioned schedule. And

Also admitted by plaintiff that the warrant as pleaded in paragraph XI of the answer, was issued and delivered, but he does not admit the defendant's contention that it was issued and accepted in full discharge and satisfaction of the alleged indebtedness set forth in the first cause of action; and plaintiff makes the same admission in reference to all the several causes of action after the first, which are pleaded in the paragraphs of the answer from XII to LXXXII, both inclusive, as he has made of the facts alleged in paragraphs VI to XI, both inclusive, corresponding changes as to varying times and amounts being made, and the foregoing admissions and statements of fact being applied to the respective defenses to each cause of action in turn. And the above-mentioned schedule is to be taken as a statement of facts and evidence, as the same may be applicable to each cause of action or defense as the case may be.

It is stipulated that the municipal organization of the defendant was perfected on October 11, 1890; that on November 14, 1890, an ordinance No. 25 was passed providing for the payment of warrants in the order of their presentation to the city treasurer and was in force until November 30, 1891, when ordinance No. 105 was passed providing for their payment in the order of their issuance "Whenever there is money in the city treasury to pay them," which ordinance is still in force; that the current series of warrants payable from the general fund begins with No. 1, issued on January 4, 1892, and all prior demands or liabilities have been paid or canceled exclusive of the \$60,000 bond issue to be mentioned. That during



the years 1892, 1893 and 1894, the defendant has levied a tax of six mills as a general fund for city purposes upon all the taxable properties in the city as assessed during those years. That in addition to the other indebtedness mentioned in the schedule it is admitted that the defendant is indebted on an issue of \$60,000 of bonds, which were voted in the year 1891, running fifteen years and all sold and still outstanding.

#### *Cross-Examination.*

The \$60,000 issue of bonds was voted June 8, 1891, issued September 10, 1891, for the dredging of streets and alleys—filling streets and alleys. \$35,000 for that particular purpose and the other \$25,000 was for the grading, etc., of street intersections and parts of streets and alleys that there was no property abutting on to assess for that purpose. The result of half of these bonds that were issued was to purchase a certain triangular strip of land to straighten a street, but that was not the purpose of the bonds when they were first voted. I think that purpose was stated in the notice and other documents after election. The entire \$25,000 was for that purpose and the other \$12,500 was all put into the street intersection fund, but half of it was used to purchase the triangular strip of land. These bonds are still all outstanding, being the only city bonds that have ever been issued. In the years 1892-3 there was only one general fund but in 1894 there was a general fund, a sewer fund, street fund and two bond interest funds. There was a separate tax levied for each of those funds. In 1894 the separate amounts of receipts were six mills for general fund purposes, two and

a half mills for street purposes, one mill for sewer purposes and nine mills to pay interest on the bonds, making eighteen and a half mills. In 1891-92 there was a road levy beside the six mills for the general fund; in 1893 and 1894 there was a levy made for street purposes, but the levy for 1894 was half a mill larger than 1893. In 1893 there was also a sewer fund tax. In 1893 the bond interest was paid from the bond interest fund, in 1892 mostly from the general fund. I think there was some money borrowed from the bonded street fund, and placed in the general fund with the intention of paying it back when there was money in the fund for payment of interest, but I think it has never been paid back yet. This statement for 1893 shows that some money was paid out of the general fund for bond interest, and bringing the footing of the outstanding warrants down to November, 1894, they make twenty-seven odd thousand dollars, including money paid out for bond interest from the general fund. The footing carries down the balance from month to month, and all these figures have been taken from the books and I am quite familiar with the books and think I have the correct amounts. I have been connected with the city in an official capacity since the first of 1894.

(Witness is referred to his statement at the top of the second sheet of the schedule) of the expenses of the city for 1893, giving salary of the city officers and warrants to the water company and then grouping everything else under other expenses, and is asked to state what those expenses are in general, if they include anything beside the ordinary current expenses of running the city government.)

The entire amount of warrants issued was \$14,791.44 and I divided them up, took the salaries of the city officers and the amount of warrants paid to the water company and segregated the others out under "other expenses," including in that account current expenses, printing, room rent and other incidental expenses of the city government, and I remember also that they paid something over \$1000 on the fire engine, giving a note for it, for which the council afterwards made arrangements with the parties and exchanged their note for a general fund warrant. I do not remember anything else outside of the incidental and current expenses during my term of office. Everything of whatever character is included in the total for that year. In 1894 the total expenses, including salaries and water company warrants, were \$38,013.34, the statement from month to month including those issued to the water company.

(Witness is again referred to statement at the end of the schedule.

General fund warrants issued from time to time from January 1 to June 2, 1892, \$6,170 of warrants were issued, but I do not know whether it was all for the current expenses of that period or not as I was not clerk at that time and just entered those items up. From July 1, 1892, to October 16, 1893, \$17,542.61 were issued, including, I think, the interest on the bonds during the whole of that period, but the last item, October 16, 1893, to October 1, 1894, \$6,353.28, I do not think that includes anything besides the salaries, water rents and current incidental expenses, including, however, all warrants of every character issued by the city on the general fund, the city hav-

ing a salary fund also, that fund taking effect the first of 1895, the money being taken out of the general fund, turned into a special fund for the payment of officers, and the salaries payable in cash from that at a much reduced price. There were warrants issued on those funds and cashed in the order of their issue the same as they are in the other fund.

Plaintiff then makes the following admissions:

That the city levied in 1894 the taxes for the street fund, general fund, sewer fund and interest fund. In addition to the six mills for general purposes that the defendant levied in the year 1893 on all taxable property within it a tax of two mills on the dollar for street repairs and one mill on the dollar for sewer repairs, and seven mills on the dollar for the interest on the said \$60,000 worth of bonds, and the same was done in 1894, except that the rates varied somewhat; that the interest on said \$60,000 bond issue was paid prior to 1893 from the general fund and that all said special tax levies in 1893 and 1894 were carried into the general fund of the said city.

(Witness proceeds:)

In 1893 and 1894 the taxes that were raised for sewer repairs and streets repairs were placed in the sewer and street fund and not in the general fund. They were special taxes raised on the rates before mentioned and were kept in funds apart from the general funds and were used for those special purposes, consequently they did not go into the footings which I have given for 1893 and 1894 of the city's income from the general fund. The warrants issued to The South Bend Water Company were from the general fund series, and I think the second series is under

letter "B," starting from January 1, 1892. I think the prior ones are out of existence now. During the years 1893 and 1894 all the city's revenue was applied in payment of outstanding warrants.

*Redirect Examination.*

The separate funds known as the sewer fund and the street fund were established the first of 1894 upon the 1893 assessment, and prior to that all the money received by the city went into the general fund prior to 1893. During the years 1893 and 1894 I resided in South Bend and was acquainted with the quality of the water furnished to the inhabitants of South Bend by The South Bend Water Company and I do not think it was very good, especially during the summer months.

Witness is then handed a book which he identifies as the proceedings of the City Council of South Bend.

Defendant offers in evidence page 293 of said proceedings of the City Council and asks to have the witness read it into the record.

This was a report by the board of health on June 18th, 1894, and there being no objection said report was read as follows:

"To the Mayor and City Council,  
South Bend, Washington.

We, the Board of Health of the city of South Bend have made a thorough examination of the water furnished said city by The South Bend Water Company. First we find——"

Plaintiff objects as incompetent, irrelevant and immaterial.

Admitted in evidence subject to the objection.

“First we find the well from which the water is furnished is dead and stagnant water, and surrounding said well and within twenty feet thereof the water stands green and offensive and is on a level with the water in the well.

Second: The reservoir being in a like condition we recommend the City Council to condemn said water as wholly impure and unfit for city uses.

(Signed)

W. GRUELL.

GEORGE W. MYERS,

ED ACKERMAN,

Health Officers.”

Plaintiff objects to report just read as incompetent, irrelevant and immaterial under the pleadings.

Objection overruled and exception allowed.

*Recross-Examination.*

I do not know whether the objection was afterwards obviated by the purification and improvement of the supply since then as the council never took any further action in the matter after that while I was clerk, June 18, 1894. I have been to the reservoir but not to the pump house—the last time I was there being shortly after this, some time in June or July.

Defendant then offered in evidence the schedule referred to by witness. Schedule received in evidence and marked “Defendant’s Exhibit 1,” and is as follows:

“Assessed valuation of all real and personal  
property in the city of South Bend, Wash.,  
as equalized in 1892.....\$1,908,478 00

General fund warrants outstanding against the city of South Bend and not paid for want of funds on April 3d, 1893.....	15,640 64
Amount in the city treasurer's general fund April 3, 1893.....	730 56

The first payment became due Oct. 1st, 1893, under the first cause of action, and general fund warrant No. 511 was issued Oct. 17, 1893.

Amount of general fund warrants outstanding and unpaid for want of funds, and balance in the city treasurer's general fund on same dates on periods from Oct. 1, 1893, to Oct. 1, 1894:

Warrants outstanding Oct. 1, 1893.....	\$21,628 46
Warrants outstanding Nov. 1, 1893.....	22,779 48
Warrants outstanding Dec. 1, 1893.....	22,959 48
Warrants outstanding Jan. 1, 1894.....	25,311 88
Warrants outstanding Feb. 1, 1894.....	25,824 63
Warrants outstanding Mch. 1, 1894.....	24,504 52
Warrants outstanding Apr. 1, 1894.....	28,081 69
Warrants outstanding May 1, 1894.....	26,725 40
Warrants outstanding June 1, 1894.....	26,394 40
Warrants outstanding July 1, 1894.....	26,542 89
Warrants outstanding Aug. 1, 1894.....	26,687 89
Warrants outstanding Sep. 1, 1894.....	26,692 89
Warrants outstanding Oct. 1, 1894.....	27,011 09
Warrants outstanding Nov. 1, 1894.....	27,151 59

Also the amounts in the city treasurer's general fund upon the same dates:

City Treasury Oct. 1, 1893.....	\$ 91 85
City Treasury Nov. 1, 1893.....	91 85
City Treasury Dec. 1, 1893.....	91 85

City Treasury Jan. 1, 1894.....	423 05
City Treasury Feb. 1, 1894.....	1,233 05
City Treasury Mch. 1, 1894.....	2,346 30
City Treasury Apr. 1, 1894.....	125 34
City Treasury May 1, 1894.....	243 49
City Treasury June 1, 1894.....	297 28
City Treasury July 1, 1894.....	491 35
City Treasury Aug. 1, 1894.....	491 35
City Treasury Sep. 1, 1894.....	541 06
City Treasury Oct. 1, 1894.....	589 58
City Treasury Nov. 1, 1894.....	589 58

Revenue for the fiscal year of 1893:

For licenses collected.....	\$4,300 32
Mill levy on assessed valuation.....	3,120 84
	<hr/>
Total revenue, 1893.....	\$7,421 16

Expenses of the city of South Bend, Wash., for the year 1893:

Salary of city officers for the year 1893.....	\$ 2,800 64
Warrants issued to The South Bend Water Co..	859 40
Other expenses.....	11,059 40
	<hr/>
Total expense for year 1893.....	\$14,791 44

Following amounts have been paid The South Bend Water Co. by issue of general fund warrants on the different dates and accepted by them with the exception of the last one of May 1st, for \$36.00:

Aug. 1893, No. 465.....	\$139 40
Sep. 19, 1893, No. 487.....	180 00
Oct. 17, 1893, No. 511.....	180 00
Nov. 28, 1893, No. 520.....	180 00



Dec. 14, 1893, No. 534.....	180 00
Jan. 9, 1894, No. 545.....	133 10
Jan. 9, 1894, No. 546.....	46 90
Feb. 6, 1894, No. 567.....	60 00
Feb. 6, 1894, No. 568.....	120 00
Mch. 6, 1894, No. 581.....	180 00
Apr. 2, 1894, No. 598.....	180 00
May 1, 1894, No. 617.....	36 00

Revenue, city of South Bend, for the year 1894:

Amount collected for licenses.....	\$1,272 65
6 mill levy on assessed valuation.....	3,151 54
Total revenue, year 1894.....	<u>\$4,424 19</u>

Expenses of the city of South Bend, Wash., year 1894:

Salaries of city officers.....	\$1,847 24
Warrants issued to The South Bend Water Co..	756 00
Other expenses.....	1,210 10
Total expense year 1894.....	<u>\$3,813 34</u>

Schedule of assessed valuation, indebtedness, annual revenue and expenditure for sundry years:

Date of assessment taking effect.	Equalized valuation.
May 29, 1891.....	\$2,868,825 00
June 2, 1892.....	1,918,478 00
Oct. 16, 1893.....	520,138 00
Oct. 1, 1894.....	525,258 00

Indebtedness exclusive of \$60,000 bonds:

1891	None known or then existing.
June 2, 1892.....	10,456 86
Apr. 3, 1893.....	15,640 64

Oct. 16, 1893.....	21,628 46
Oct. 1, 1894.....	27,011 09

Cash in the city treasury on sundry dates as follows:

June 2, 1892.....	\$421 13
Apr. 3, 1893.....	731 56
Oct. 16, 1893.....	91 85
Oct. 1, 1894.....	589 58

General fund warrants issued from

Jan. 1, 1892 to June 2, 1892.....	\$ 6,170 16
June 2, 1892 to July 1, 1892.....	918 50
July 1, 1892 to Oct. 16, 1893.....	17,542 61
Oct. 16, 1893 to Oct. 1, 1894.....	6,353 28

Witness H. M. FLINT, recalled for plaintiff in rebuttal, testified as follows:

There was an assessed valuation for 1890 but I have not the figures here; that was the first assessment and was within a few thousand dollars of the assessment for 1892. The one given here for 1891 was the one in existence at the time of voting the bonds.

Plaintiff moves to strike out the passage just read from the city council proceedings with reference to impurity of water on June 18, 1894, as incompetent, irrelevant and immaterial. Motion denied and exception allowed.

Testimony closed.

And because none of said several proceedings, exhibits, testimony and other matters of evidence, objections, rulings, exceptions and other matters hereinabove set forth are of record, and the plaintiff has desired to have the same made of record for the purpose of a review of the judgment entered upon said verdict by writ of error to

said Court, the plaintiff has propounded the foregoing as a complete bill of exceptions of all the evidence and other proceedings not already of record in behalf of both parties, and the same has been settled and is now certified and signed by the undersigned as a bill of exceptions, containing all of the evidence and other matters occurring at and about the trial of said cause on said dates, not already of record in the cause.

C. H. HANFORD,  
District Judge.

Dated April 1, 1896.

And, afterwards, to-wit, on the 2nd day of April, 1896, there was duly filed in said court in this cause, an Assignment of Errors, in the words and figures as follows, to-wit:

*In the Circuit Court of Appeals of the United States, for the Ninth Circuit.*

CHESTER H. KIEHL, as Receiver of The South Bend Water Company, Plaintiff in Error, vs.	} No. —
THE CITY OF SOUTH BEND.	

**Assignment of Errors.**

Now comes the above-named Chester H. Kiehl, as receiver of The South Bend Water Company, plaintiff in error herein, by Charles E. Shepard, his attorney, and says that in the record and proceedings in the above-entitled cause in the Circuit Court of the United States, for the District of Washington, and in the Western Divis-

ion thereof, there was manifest error, and he hereby assigns as errors of the court therein, the following, to-wit:

1. The Court below erred in making its eleventh finding of fact, because the same is contrary to the evidence and there was no evidence sufficient to sustain the same, and the Court should have found the contrary thereof.

2. The Court below erred in making its twelfth finding of fact, because the same is contrary to the evidence and there was no evidence sufficient to sustain the same, and the Court should have found the contrary thereof.

3. The Court below erred in that portion of its second conclusion of law which is as follows: "When the increase of the city's debt and the decline of assessed valuation brought the city's general debt (exclusive of the \$60,000 bond debt by popular vote) to a point where the constitutional limit of one and one-half per cent of the assessed valuation was exceeded, the city's power to incur further debt under the contract became suspended and did and will so remain till the general debt (exclusive of the \$60,000 bond debt) again falls within that limit. The contract is not abrogated or invalidated, but the power to incur or pay new debt under it is suspended by the higher power of the constitution," because the same is contrary to law and the Court should have found to the contrary of the foregoing passage and should have found as requested that the contract embodied in the ordinance of the city of South Bend, No. 100, being a valid contract at its inception, created a binding and legal charge of expense of the city which it was compellable to pay during the period of the contract.

4. The Court below erred in its fourth conclusion of

law, because the same is contrary to the law, and the Court should have found to the contrary of said conclusion.

5. The Court below erred in its fifth conclusion of law, because the same is contrary to the law, and the Court should have found to the contrary of said conclusion.

6. The Court below erred in its sixth conclusion of law, because the same is contrary to the law, and the Court should have found to the contrary of said conclusion.

7. The Court below erred in denying the motion of the plaintiff below for a new trial.

8. The Court below erred in rendering judgment for the defendant below and not rendering judgment for the plaintiff below for the amount of the rentals and damages sued for.

9. The Court below erred in rendering a judgment in abatement of the action in favor of the defendant below on the causes of action set forth in the first, second, third, fourth, fifth, sixth and seventh causes of action or counts in the complaint, and in not rendering a judgment on the merits in favor of the plaintiff below on said causes of action.

10. The Court below erred in rendering judgment for the defendant below upon the causes of action set forth in the eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action or counts of the complaint, and in not rendering judgment for the plaintiff thereon.

CHARLES E. SHEPARD,  
Attorney for Plaintiff in Error.

United States of America, )  
 District of Washington, ) ss.  
 Western Division. )

### **Clerk's Certificate.**

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the District of Washington, do hereby certify the writings hereunto attached to be a true transcript of the record and proceedings in case Number 355, Chester H. Kiehl, as receiver of The South Bend Water Company, plaintiff, against The City of South Bend, defendant, as the same remain on file and of record in my office.

In Witness Whereof, I hereunto subscribe my name, and affix the seal of the said Court at my office in the city of Tacoma, in said district, this 11th day of April, A. D. 1896.

[Seal]

A. REEVES AYRES, Clerk,  
 By Sam'l D. Bridges, Deputy.

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### **Clerk's Certificate as to Cost of Transcript.**

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States, for the District of Washington, do hereby certify that the cost of the foregoing record amounts to the sum of ninety dollars, and that the same has been paid in full by the plaintiff, Chester H. Kiehl, as receiver of The South Bend Water Company.

In Witness Whereof, I hereunto set my hand and the seal of said court this 11th day of April A. D. 1896.

[Seal]

A. REEVES AYRES, Clerk.

By Sam'l D. Bridges, Deputy.

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[Endorsed]: No. 293. In the United States Circuit Court of Appeals, for the Ninth Circuit. Transcript of Record. In Error to the United States Circuit Court, District of Washington, Western Division. Chester H. Kiehl, as Receiver of The South Bend Water Company, Plaintiff in Error, vs. The City of South Bend, Defendant in Error.

Filed April 27th, 1896.

F. D. MONCKTON,

Clerk.

